

Kimberly E. Colwell, Esq. (SBN: 127604)  
 kcolwell@meyersnave.com  
 Kevin E. Gilbert, Esq. (SBN: 209236)  
 kgilbert@meyersnave.com  
 MEYERS, NAVE, RIBACK, SILVER & WILSON  
 555 12<sup>th</sup> Street, Suite 1500  
 Oakland, CA 94607  
 Telephone: (510) 808-2000  
 Facsimile: (510) 444-1108

Attorneys for Defendants  
 JASON FLETCHER, ANTHONY MORGAN  
 and CITY OF SAN LEANDRO

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

LYDIA PACHECO-CESENA,  
 Plaintiff,

v.

JASON FLETCHER, ANTHONY MORGAN,  
 SAN LEANDRO POLICE DEPARTMENT,  
 CITY OF SAN LEANDRO, a Municipal  
 Corporation, and DOES 1 through 100,  
 inclusive,  
 Defendants.

Case No: C-07-2974 EMC

**DEFENDANTS JASON FLETCHER,  
 ANTHONY MORGAN AND CITY OF  
 SAN LEANDRO'S ANSWER TO  
 PLAINTIFF'S COMPLAINT; DEMAND  
 FOR JURY**

COMES NOW THE CITY OF SAN LEANDRO (on its own behalf and on behalf of the San  
 Leandro Police Department improperly named as an individual defendant herein; hereinafter "City"),  
 JASON FLETCHER (hereinafter "Fletcher") and ANTHONY MORGAN (hereinafter "Morgan") who  
 answer Plaintiff's Complaint as follows:

**JURISDICTION**

1. In answer to paragraph 1, Defendants City, Fletcher and Morgan (Defendants) admit  
 that Plaintiff has filed an action alleging that issues arise out of the Fourth and Fourteenth  
 Amendments to the Constitution of the United States as well as 42 U.S.C. 1983.

2. In answer to paragraph 2, Defendants City, Fletcher and Morgan admit that this Court  
 has jurisdiction over this matter.

**VENUE**

3. In answer to paragraph 3, Defendants City, Fletcher and Morgan admit that venue is proper in the District Court.

4. In answer to paragraph 4, Defendants City, Fletcher and Morgan deny the allegations of this paragraph except as to the City. Defendants admit that venue is proper.

**PARTIES**

5. In answer to paragraph 5, Defendants City, Fletcher and Morgan deny the allegations of this paragraph based on a lack of information and belief.

6. In answer to paragraph 6, Defendants City, Fletcher and Morgan admit the allegations thereof.

7. In answer to paragraph 7, Defendants City, Fletcher and Morgan admit the allegations thereof.

8. In answer to paragraph 8, Defendants City, Fletcher and Morgan admit the allegations thereof.

9. In answer to paragraph 9, Defendants City, Fletcher and Morgan admit the allegations thereof.

10. In answer to paragraph 10, and due to the ambiguity of this paragraph, Defendants City, Fletcher and Morgan deny the allegations thereof based on a lack of information and belief.

**FACTUAL ALLEGATIONS**

11. In answer to paragraph 11, Defendants City, Fletcher and Morgan admit that they contacted plaintiff, defendants deny the remaining allegations of this paragraph based on information and belief.

12. In answer to paragraph 12, Defendants City, Fletcher and Morgan deny the allegations therein.

13. In answer to paragraph 13, Defendants City, Fletcher and Morgan deny the allegations therein.

14. In answer to paragraph 14, Defendants City, Fletcher and Morgan deny the allegations therein as to their conduct as is mischaracterized by plaintiff.

**FIRST CLAIM FOR RELIEF**

15. In answer to paragraph 15, Defendants City, Fletcher and Morgan reallege their answers to paragraphs 1 – 14 and incorporate same herein by reference.

16. In answer to paragraph 16, Defendants City, Fletcher and Morgan deny the allegations therein.

17. In answer to paragraph 17, Defendants City, Fletcher and Morgan deny the allegations therein.

18. In answer to paragraph 18, Defendants City, Fletcher and Morgan deny the allegations therein.

19. In answer to paragraph 19, Defendants City, Fletcher and Morgan admit the police department is an agency of the City. Defendants are unable to admit or deny the remaining allegations based on the vagaries of the pleadings.

20. In answer to paragraph 20, Defendants City, Fletcher and Morgan deny the allegations therein based on a lack of information and belief.

21. In answer to paragraph 21, Defendants City, Fletcher and Morgan deny the allegations therein based on a lack of information and belief.

22. In answer to paragraph 22, Defendants City, Fletcher and Morgan deny the allegations therein based on a lack of information and belief.

23. In answer to paragraph 23, Defendants City, Fletcher and Morgan deny the allegations therein based on a lack of information and belief.

24. In answer to paragraph 24, Defendants City, Fletcher and Morgan deny the allegations therein.

**SECOND CLAIM FOR RELIEF**

25. In answer to paragraph 15, Defendants City, Fletcher and Morgan reallege their answers to paragraphs 1 – 24 and incorporate same herein by reference.

26. In answer to paragraph 26, Defendants City, Fletcher and Morgan admit this court has pendant jurisdiction over plaintiff's state claims.

27. In answer to paragraph 27, Defendants City, Fletcher and Morgan deny the allegations

1 therein.

2 28. In answer to paragraph 28, Defendants City, Fletcher and Morgan deny the allegations  
3 therein based on a lack of information and belief.

4 29. In answer to paragraph 29, Defendants City, Fletcher and Morgan deny the allegations  
5 therein.

6 30. In answer to paragraph 30, Defendants City, Fletcher and Morgan admit that plaintiff  
7 filed a claim.

8 31. In answer to paragraph 31, Defendants City, Fletcher and Morgan deny the allegations  
9 therein.

10 **PRAYER**

11 32. In answer to paragraph 1 of the prayer defendants deny plaintiff is entitled to any award  
12 of damages.

13 33. In answer to paragraph 2 of the prayer defendants deny plaintiff is entitled to punitive  
14 damages.

15 34. In answer to paragraph 3 of the prayer defendants deny plaintiff is entitled to attorney's  
16 fees.

17 **AFFIRMATIVE DEFENSES**

18 **FIRST AFFIRMATIVE DEFENSE**

19 The Complaint fails to state a claim upon which relief can be granted.

20 **SECOND AFFIRMATIVE DEFENSE**

21 Defendants City, Fletcher and Morgan, and each of them, at all times, acted in good faith,  
22 without malice and within the scope and course of their employment, and under the reasonable belief  
23 that their actions were lawful. Accordingly, Defendants and each of them are entitled to qualified  
24 immunity herein.

25 **THIRD AFFIRMATIVE DEFENSE**

26 To the extent that the Plaintiff's claims are founded upon principals of negligence, Plaintiff was  
27 negligent in and about the matters referred to in her Complaint. Such negligence bars or diminishes  
28 Plaintiff's recovery against Defendants City, Fletcher and Morgan.

**FOURTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from liability pursuant to the provisions of California Government Code Sections 820.2 and 815.2.

**FIFTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from liability pursuant to the provisions of California Government Code Sections 820.4 and 815.2.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's prayer for exemplary damages is precluded under California Government Code Section 818.

**SEVENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from liability pursuant to California Government Code Sections 818.8 and 815.2.

**EIGHTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from liability pursuant to California Government Code Sections 820.8 and 815.2.

**NINTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from liability pursuant to California Government Code Sections 821.6 and 815.2.

**TENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from liability pursuant to California Government Code Sections 822.2 and 815.2.

**ELEVENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that they had probable cause to believe that their actions toward the Plaintiff were lawful.

**TWELFTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from the claims contained in Plaintiff's Complaint pursuant to the provisions of California Penal Code Section 835.

///

**THIRTEENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from the claims contained in Plaintiff's Complaint pursuant to the provisions of California Penal Code Section 835(a).

**FOURTEENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from the claims contained in Plaintiff's Complaint pursuant to the provisions of California Penal Code Section 836.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are immune from the claims contained in Plaintiff's Complaint pursuant to the provisions of California Penal Code Section 836.5.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims against Defendant City of San Leandro under 42 U.S.C. § 1983 are contrary to law, in that they are founded upon the doctrine of *respondeat superior*. Neither a municipality nor its officers, supervisors, or policy makers can be held liable under 42 U.S.C. § 1983 under a *respondeat superior* theory. (*Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).)

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan are informed and believe and thereby allege that Plaintiff's alleged damages or injuries, if any, were aggravated by the failure of Plaintiff and/or other individuals to use reasonable diligence to mitigate those injuries or damages.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that Defendants took reasonable precautions with regard to protecting against any risk of injury complained of by Plaintiff.

**NINETEENTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that the Plaintiff had the express knowledge of the risks and hazards set forth in the Complaint, as well as the magnitude of the risks and hazards and thereafter knowingly and willingly assumed those risks.

**TWENTIETH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that Plaintiff has waived her right to maintain the action filed in the Complaint.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that Plaintiff is barred by the principal of estoppel from maintaining the action filed in this case.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan and each of them allege that they were privileged to detain Plaintiff at the time and place alleged.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that the Complaint, and each cause of action thereof, fail to state facts sufficient to constitute an award of attorney's fees against these Defendants.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that Plaintiff was comparatively at fault in the manner and style as set forth in the case in the case of *Li v. Yellow Cab Company*, 13 Cal. 3d 804 (1975), and these Defendants pray that any and all damages sustained by said Plaintiff be reduced by the percentage of her negligence.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that Plaintiff is guilty of willful misconduct which contributed to the happening of the incident which resulted in her alleged injuries.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Defendants City, Fletcher and Morgan allege that Plaintiff's claim for punitive damages is barred by the doctrine enunciated in *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981).

**JURY DEMAND**

Defendants City, Fletcher and Morgan hereby demand trial by jury.

///

///

///

///

///

///

**PRAYER**

WHEREFORE, Defendants City, Fletcher and Morgan pray as follows:

1. That Plaintiff takes nothing by reason of her Complaint and judgment be rendered in favor of Defendants including but not limited to the named Defendants herein;
2. That Defendants be awarded their costs incurred in the defense of this action; and
3. For such other relief as the Court deems proper.

Dated: June 29, 2007

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: \_\_\_\_\_/s/\_\_\_\_\_  
Kimberly E. Colwell  
Attorneys for Defendants  
JASON FLETCHER, ANTHONY MORGAN  
and CITY OF SAN LEANDRO

983275\_1